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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JUAN GONZALEZ MERCEDES,

Plaintiff,

-against-

TITO TRANSMISSION CORP., et al.,

Defendants.

15cv01170 (CM) (DF)

REPORT AND RECOMMENDATION

TO THE HONORABLE COLLEEN MCMAHON, U.S.D.J.:

This action, brought under the Fair Labor Standards Act ("FLSA") and New York Labor Law ("NYLL"), has been referred to this Court for general pretrial supervision. For the reasons set out below, however, and as discussed more fully in an Order issued by this Court on February 8, 2017 (Dkt. 38), a copy of which is attached hereto for reference, I recommend that a default judgment be entered against defendants Tito Transmission Corp., d/b/a V.A. Automatic Transmission Repairs ("Tito Transmission"), and Vincente Amparo ("Amparo") (collectively, "Defendants"), for their repeated failure to comply with this Court's Orders and their apparent abandonment of any defense of this action.

DISCUSSION

By letter motion dated December 7, 2016 (Dkt. 35; *see also* Dkt. 37 (supplementing motion)), plaintiff Juan Gonzalez Mercedes ("Plaintiff") moved for the imposition of sanctions against Defendants for their failures to cooperate in discovery and to attend Court-ordered conferences. Specifically, Plaintiff sought (1) a monetary sanction to compensate Plaintiff, his counsel, and a Spanish interpreter for time incurred in attending scheduled Court conferences for which Defendants and their counsel failed to appear, in apparent defiance of explicit Court directives, and (2) the entry of a default judgment against both Defendants.

By Order dated February 8, 2017 (Dkt. 38), this Court considered the law applicable to the imposition of the types of sanctions requested. Upon consideration of that law and the procedural history of this case, this Court imposed a monetary sanction on both Defendants and their counsel under Rules 16(f)(1) and 37(b)(2)(c) of the Federal Rules of Civil Procedure (*see* Dkt. 38, at Sections I and II(A)), but determined that it would be premature to recommend the entry of a default judgment, given that, in this Court's view, it was possible that lesser sanctions would be sufficient to compel compliance (*see id.* at Section II(B) (citing, *e.g.*, *Agiwal v. Mid Island Mortgage Corp.*, 555 F.3d 298, 303 (2d Cir. 2009))). So as to give Defendants a final opportunity to comply, this Court (1) ordered payment of the monetary sanction by February 22, 2017; (2) ordered Defendants to produce certain documents by that same date; (3) rescheduled, to March 1, 2017, the in-person conference for which Defendants and their counsel had twice failed to appear; (4) and directed Defendants' counsel to confirm to this Court by February 22, 2017 that both he and his clients would attend the March 1 conference. This Court expressly cautioned Defendants and their counsel that, if they failed to make a timely payment of the monetary sanction, to make a timely document production, or to confirm their intended appearance at the March 1 conference, then this Court would cancel the conference (rather than require Plaintiff's counsel and Plaintiff to appear unnecessarily, for a third time) and would recommend that a default judgment be entered against Defendants.

By letter dated February 25, 2017 (Dkt. 39), Plaintiff's counsel informed this Court that, as of that date, Defendants and their counsel had "not submitted any portion of the sanctions award" and had also "not submitted any discovery documents to Plaintiff." Further, since issuing its February 8 Order, this Court has received no communication from Defendants' counsel (or from Defendants directly), either confirming an intent to appear for the March 1 conference, requesting an adjournment of that conference, raising any issue regarding an inability to appear, or challenging this Court's imposition of a monetary sanction or its discovery ruling. This Court's Chambers has not been contacted informally in this regard, and no motion for reconsideration or any other filing by Defendants has been made. In short, Defendants and their counsel have now demonstrated an intent to ignore this Court entirely and, apparently, to abandon any defense of this action.

CONCLUSION

As Defendants have failed to comply with any aspect of this Court's February 8, 2017 Order, thus demonstrating that lesser sanctions are not sufficient to compel their compliance with this Court's Orders or their discovery obligations, I hereby recommend that Defendants be held in default, and that a default judgment be entered against them, with the amount of damages due to Plaintiff to be determined upon a damages inquest.

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have fourteen (14) days from service of this Report to file written objections. *See also* Fed. R. Civ. P. 6. Such objections, and any responses to objections, shall be filed with the Clerk of Court, with courtesy copies delivered to the chambers of the Honorable Colleen McMahon, United States Courthouse, 500 Pearl Street, Room 2550, New York, New York 10007, and to the chambers of the undersigned, United States Courthouse, 500 Pearl Street, Room 1660, New York, New York, 10007. Any requests for an extension of time for filing objections must be directed to Judge McMahon. FAILURE TO FILE OBJECTIONS WITHIN FOURTEEN (14) DAYS WILL RESULT IN A WAIVER OF OBJECTIONS AND WILL PRECLUDE APPELLATE REVIEW. *See Thomas v. Arn*, 474 U.S. 140, 155 (1985); *IUE AFL-CIO Pension Fund v. Herrmann*, 9 F.3d 1049, 1054 (2d Cir. 1993); *Frank v. Johnson*, 968 F.2d 298, 300 (2d Cir. 1992); *Wesolek v. Canadair Ltd.*, 838 F.2d 55, 58 (2d Cir. 1988); *McCarthy v. Manson*, 714 F.2d 234, 237-38 (2d Cir. 1983).

Dated: New York, New York
March 7, 2017

Respectfully submitted,

DEBRA FREEMAN
United States Magistrate Judge

Copies to:

All counsel (via ECF)

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JUAN GONZALEZ MERCEDES,

Plaintiff,

-against-

TITO TRANSMISSION CORP., et al.,

Defendants.

15cv01170 (CM) (DF)

ORDER

DEBRA FREEMAN, United States Magistrate Judge:

The Honorable Colleen McMahon, U.S.D.J., has referred this Fair Labor Standards Act ("FLSA") and New York Labor Law ("NYLL") case to this Court for general pretrial supervision. Currently before this Court is a motion by plaintiff Juan Gonzalez Mercedes ("Plaintiff"), seeking the imposition of sanctions against defendants Tito Transmission Corp., d/b/a V.A. Automatic Transmission Repairs ("Tito Transmission"), and Vincente Amparo ("Amparo") (collectively, "Defendants"), for their failure to appear at two court conferences or to produce discovery, as directed by this Court. Specifically, Plaintiff and his counsel seek a sanctions award of $2,002.50 to reimburse them for the time that they (and an interpreter) spent in attending the conferences in question, and the entry of a default judgment against Defendants based on Defendants' non-compliance with multiple court orders.

For the reasons discussed below, Plaintiff's motion is granted to the extent it seeks the imposition of monetary sanctions against Defendants and their counsel, although this Court has adjusted the amount of the sanctions award downward from the amount sought. As to Plaintiff's separate request for entry of a default judgment against Defendants, this Court will defer acting on that aspect of Plaintiff's motion until it becomes evident whether the lesser sanction of a monetary award is sufficient to compel Defendants' compliance with court orders. If Defendants fail to pay the monetary sanction imposed by this Court, continue to fail to comply with discovery orders, or fail to take advantage of a final opportunity that this Court will afford them to appear and defend this case, then this Court will proceed to recommend to Judge McMahon that a default judgment be entered.

BACKGROUND

A. Initial Proceedings Before Judge McMahon

This case was commenced on February 18, 2015, by Plaintiff's filing of a Complaint alleging FLSA and NYLL violations, arising from Plaintiff's alleged employment by Defendants. (*See generally* Complaint, dated Feb. 18, 2015 (Dkt. 1).) After Defendants had been served with process, but failed to appear, Plaintiff filed a motion for a default judgment. (Dkt. 12.) After that motion was made, though, an attorney – Ramon Wigwaldo Pagan, Sr., Esq. ("Pagan") – filed a Notice of Appearance on behalf of both Defendants (Dkt. 19),[1] and then wrote a letter to Judge McMahon, stating that Plaintiff had previously "settled the matter" with defendant Amparo, having "executed a release in favor of Mr. Amparo last year." (Letter to the Court from Pagan, filed May 23, 2016 (Dkt. 20).) Pagan stated that Plaintiff's counsel, Michael Faillace, Esq. ("Faillace"), of the law firm of Michael Faillace & Associates, P.C. (the "Faillace Firm"), had not brought the "release" to the Court's attention in connection with Plaintiff's default motion, even though Faillace was aware of it. (*Id.*) According to Pagan, Faillace merely indicated to Pagan that Plaintiff had "changed his mind" regarding the

[1] Although the Docket only reflects that Pagan has appeared in this action on behalf of Amparo, the Notice of Appearance states, under a caption listing both named Defendants: "Please take notice that Ramon W. Pagan, Esq. hereby appears as attorney for the above named defendants." (Dkt. 19.) This Court thus understands that Pagan is representing both Tito Transmission and Amparo.

settlement. (*Id.*) Pagan also wrote that Amparo was not "notified of this event" (presumably the default motion), "nor has a refund been given to Mr. Amparo." (*Id.*)

Upon receiving this letter, Judge McMahon scheduled a conference for June 24, 2016 (Dkt. 21), but Pagan failed to appear at that conference. Judge McMahon then rescheduled the conference to August 5, 2016, in a written Order in which the Court found that Pagan's representation that a prior release had not been brought to the Court's attention by the Faillace Firm in the default motion was "deeply disturbing" (Dkt. 24), and also noted that "[t]he fact of the prior settlement, if it was in fact entered into, could well explain the default in this case, and would almost certainly excuse it . . ." (*id.*). Judge McMahon directed Pagan to bring to the August 5 conference a copy of any release and proof of payment to Plaintiff. (*Id.*)

The August 5 conference was rescheduled twice on the Court's own initiative (Dkts. 25, 27), and a third time upon a request from Faillace, who wrote to the Court on August 12, 2016, stating that "[r]ather than arguing over whether or not a settlement agreement was reached outside of Court, and the impact said agreement would have on Plaintiff's motion for a default judgment, Plaintiff is willing to withdraw his default motion and resume litigating the case" (Dkt. 29). Once Plaintiff in fact withdrew the default motion on August 22, 2016 (Dkt. 30), Judge McMahon proceeded to hold a conference on September 16, 2016, after which she referred the case to this Court, both to determine whether the "release" still being proffered by Defendants was valid and a settlement had been reached, and, if necessary, for general pretrial supervision (*see* Minute Entry for proceedings held before Judge McMahon; *see also* Dkt. 32 (Order of Reference)).

B. Proceedings Before This Court

This Court held a telephone conference with counsel on October 5, 2016, on the record. At that conference, it became clear to this Court that the so-called "release" that had been put forward by Defendants' counsel, Pagan, had not been signed by Plaintiff *prior* to the lawsuit being commenced, but rather *afterwards*, such that, if it in fact evidenced a settlement of the FLSA claims asserted in this case, that settlement would have to be placed before the Court for fairness review, pursuant to *Cheeks v. Freeport Pancake House, Inc.*, 796 F.3d 1999 (2d Cir. 2015). Further, at the October 5 conference, Plaintiff's counsel (Jesse S. Barton, Esq. ("Barton"), of the Faillace Firm) indicated that Plaintiff was strenuously denying that any settlement agreement had been made. According to Barton, although Plaintiff was not denying that he signed the purported release, Plaintiff does not speak English, had no understanding of what he was asked to sign, did not receive any payment (despite Defendants' claim to the contrary), and would vigorously dispute that he had agreed to settle his claims in this case.

Under the circumstances, this Court pointed out that, if Defendants wished to maintain their position that this action had been settled, they (1) would have to demonstrate a meeting of the minds on all material terms of a settlement, and then (2) would have to persuade the Court that the settlement was fair and adequate. As the "release" document recited no consideration and included no settlement terms – merely stating that Plaintiff had "decided to settle this case outside of court and stop the lawsuit" (*see* Dkt. 26 (copy of purported release)) – and as Barton represented that, while Defendants claimed to have paid Plaintiff $1,500 to resolve the action, Plaintiff's wage claims alone were for $150,000, this Court noted that Defendants might face difficult obstacles in persuading the Court of the fairness of the purported settlement. This Court also suggested that perhaps the Court should hold a settlement conference, and Pagan indicated that he wanted an opportunity to discuss all of this with defendant Amparo.

At the close of the October 5 conference, this Court directed Defendants to produce whatever wage and hour records they had for Plaintiff, and directed Plaintiff's counsel to review those records and then provide Defendants with a full damages computation, informed by the records. This Court also scheduled a follow-up telephone conference for October 27, 2016, and urged the parties to discuss settlement prior to that follow-up conference. In particular, this Court encouraged Plaintiff to make a reasonable settlement demand, based on it damages computation, Defendants to make a reasonable counter-offer, and counsel to engage in good faith settlement discussions.

On October 27, this Court held the follow-up conference, to obtain an update on the parties' positions regarding the "release" and to determine whether a settlement conference with the parties would be appropriate. At the October 27 conference, however, this Court learned that Defendants had still not produced any wage-and-hour records regarding Plaintiff's employment, and that, as a result, no progress on either discovery or settlement had been made. Instead, Pagan reported to this Court that defendant Amparo had now informed him that Plaintiff was *never actually employed by Defendants*, but rather worked for another individual or company that shared the same garage as defendant Tito Transmission. According to Pagan, while Plaintiff occasionally performed work for Defendants (such a putting in or taking out a transmission), Defendants never paid him directly for that work, as he was not their employee; rather, if Defendants wanted Plaintiff to perform certain work, they approached the person in charge of the garage – a person who, Pagan thought, was named "Mr. Garcia." According to Pagan, Defendants paid Mr. Garcia for the work in question, and Mr. Garcia, in turn, was responsible for paying Plaintiff to perform that work. Defendants' counsel stated that he had asked Amparo for all records reflecting payments to Mr. Garcia for Plaintiff's services, but that his client had not provided those records to him.

This Court observed that the new statement by Pagan that Plaintiff was never Defendants' employee was seemingly at odds with the language of the "release" that Pagan had previously put forward to support the position that the matter had been resolved. Specifically, this Court noted that the "release" document (which was presumably prepared by Defendants) stated that Plaintiff had started this lawsuit "against [his] former employer Tito Transmission Corp.," and that, after speaking "with [his] former employer, Vincente Amparo," Plaintiff had "decided to settle this case outside of court and stop the lawsuit." (Dkt. 26.) This Court further noted that, if, in fact, Plaintiff had another employer, aside from Defendants, then Plaintiff might need to bring another party into this lawsuit.

Under all of these circumstances, and as no wage-and-hour documents had yet been produced by Defendants despite this Court's prior direction, this Court set a date for all parties – including both attorneys *and* clients on both sides – to appear in Court. This Court set an in-person conference date for November 15, 2016, specifically directed Defendants to produce all payment records for Plaintiff's services prior to that date, and stressed that it was "very important" for the clients on both sides to be present. When Pagan indicated that it was possible that his clients might choose to default, or that he might seek to withdraw as counsel (which could lead to a default by the corporate defendant), this Court indicated that this would make it all the more important for Defendants to be present at the conference, so that they could be fully informed by the Court of the potential consequences of a default.

On November 15, 2016, Plaintiff's counsel, Barton, appeared for the scheduled in-person conference, together with Plaintiff and an interpreter, but neither Pagan nor Defendants appeared. Approximately 30 minutes after the scheduled time of the conference, my law clerk reached Pagan by phone, and Pagan informed my clerk, in substance, that he had not been able to contact his client, and that he therefore did not intend to appear at the conference. This Court then took the bench, attempted to call Pagan directly from the bench, and reached only his voicemail. This Court left a detailed voicemail message, instructing Pagan to contact the Court, but he did not.

On November 17, 2016, this Court issued a written Order (Dkt. 33), recounting what had transpired on November 15, and rescheduling the in-person conference for December 1, 2016. In its written Order, this Court stated that Pagan and Amparo were both required to be at the rescheduled conference, and that, if Amparo lacked authorization to speak for defendant Tito Transmission, then a corporate representative of that defendant would also have to be present. (*See id.*) In addition, this Court expressly cautioned both Pagan and Defendants "that their failure to appear on December 1, 2016, may result in sanctions." (*Id.*) In this regard, this Court stated:

> If Plaintiff and his counsel again appear and Defendants do not, then Pagan and/or Defendants will, at a minimum, be required to pay the attorneys' fees and costs incurred by Plaintiff and Plaintiff's counsel in connection with the conference. A failure to appear may also result in the imposition of other sanctions, including the entry of a default judgment against Defendants.

(*Id.*)

Moreover, in its written Order, this Court cautioned Defendants that they could be sanctioned for a failure to produce documents that the Court had directed them to produce. On this point, this Court stated the following:

> Further, Defendants are expected to cooperate in the discovery process in this action. On October 5, 2016, this Court directed Defendants to produce certain wage-and-hour records prior to the October 27, 2016 telephone conference, but, at the October 27 conference, Defendants' counsel conceded that no such records had been produced. Defendants are cautioned that the continued failure to comply with a discovery Order of the Court may also result in sanctions, pursuant to Rule 37(b) of the Federal Rules of Civil Procedure.

(*Id.*)

On December 1, 2016, Plaintiff and his counsel, Barton, again appeared in Court, together with an interpreter, and Pagan and Defendants again failed to appear. At that point, this Court invited Plaintiff to move for sanctions, including a possible default.

C. Plaintiff's Sanctions Motion

Plaintiff filed his letter motion for sanctions (Dkt. 35) on December 7, 2016. In his motion, Plaintiff states that, in addition to failing to appear at the two court-scheduled conferences, Defendants have also still failed to produce any of the documents that this Court had ordered them to produce. (*See id.*) As relief for Defendants' non-compliance with court orders, Plaintiff requests (1) that Pagan and Defendants be "fined" in the amount of $2,002.50, representing (a) $400 in lost earnings incurred by Plaintiff for missing work on both November 15 and December 1, so that he could appear at the court-ordered conferences, and (b) $1,662.50 in fees incurred by Barton and the interpreter, for the time in appearing for the two conferences;[2] (2) that the Court enter a default judgment against Defendants; and (3) that the

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[2] Together with his sanctions motion, Plaintiff submitted a supporting Declaration by Barton, setting out this amount of fees, and stating that a breakdown of the fees was attached as "Exhibit A" to the Declaration. (Declaration of Jesses S. Barton, Esq., in Support of Plaintiff's Motion for Sanctions, dated Dec. 6, 2016 ("Barton Decl.") (Dkt. 35-1) ¶ 7.) This exhibit, however, was not attached to the Declaration. My Chambers contacted Barton about this missing exhibit, and, on December 29, 2016, he filed the fee breakdown. (Dkt. 37-1.)

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Court "levy any other penalty against Mr. Pagan and Defendants that the Court deems appropriate." (*Id.*)

On December 9, 2016, this Court issued a text Order directing Defendants "to file a response to Plaintiff's submission no later than 12/21/16." (Dkt. 36.) This Court's Order further stated:

> The response should include a sworn affidavit or declaration made under penalty of perjury, showing cause why sanctions – up to and including the sanction of a default judgment – should not be imposed for Defendants' (1) repeated failure to appear in Court after having been directed to do so, (2) failure to contact the Court to request an adjournment of the scheduled conferences or to provide the Court with any explanation, thereafter, for Defendants' failure to appear, and (3) apparent failure to comply with the Court's discovery Order.

(*Id.*) As of the date of this Order, Defendants have filed no response to the sanctions motion, nor made any other submission to the Court, nor contacted this Court's Chambers through any other means.

DISCUSSION

I. APPLICABLE LEGAL STANDARDS

Rule 16(f) of the Federal Rules of Civil Procedure allows a court to impose sanctions when a party fails to appear at a court-ordered conference. Specifically, Rule 16(f)(1) provides that:

> On motion or on its own, the court may issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii-vii), if a party or its attorney:
>
> (A) fails to appear at a scheduling or other pretrial conference;
>
> (B) is substantially unprepared to participate – or does not participate in good faith – in the conference; or

(C) fails to obey a scheduling or other pretrial order.

Fed. R. Civ. P. 16(f)(1). In turn, Rule 37(b) provides for a range of potential sanctions that are available for non-compliance with court orders, including the severe sanctions of directing that matters be taken as established, striking a pleading, or rendering a default judgment. *See* Fed. R. Civ. P. 37(b)(2)(A)(vi); *see also, e.g., Chopen v. Olive Vine, Inc.*, No. 12cv2269 (NGG) (MDG), 2014 WL 198814, at *3 (E.D.N.Y. Jan. 15, 2014) (adopting recommendation that defendants be sanctioned under Rules 16(f) and 37(b) for their repeated "failure to appear at Court conferences and [to] comply with Court Orders"). In addition, as an extension to the potential sanctions listed in Section (b)(2)(A), Rule 37 further provides that:

> Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure [to comply with a court order], unless the failure was substantially justified or other circumstances make an award of expenses unjust.

Fed. R. Civ. P. 37(b)(2)(C).

The same range of potential sanctions, as authorized by Rule 37(b) and (c), come into play where a party "fails to obey an order to provide or permit discovery." Fed. R. Civ. P. 37(b)(2)(A); *see also Daval Steel Prods. v. M/V Fakredine*, 951 F.2d 1357, 1363 (2d Cir. 1991) ("Provided that there is a clearly articulated order of the court requiring specified discovery, the district court has the authority to impose Rule 37(b) sanctions for noncompliance with that order."); *Agiwal v. Mid Island Mortgage Corp.*, 555 F.3d 298 (2d Cir. 2009) (affirming the district court's dismissal of case as a Rule 37(b) sanction where a party defied all of the court's discovery orders over a six-month period, "each of which warned of the possibility of sanctions, including dismissal").

"In evaluating whether a default judgment is warranted [for a party's failure to comply with a court order], courts should consider the following factors: (1) the party's history of noncompliance, (2) whether the party had sufficient time to comply; and (3) whether the party had [received] notice that further delays would result in [default]." *Sony BMG Music Entm't v. Thurmond*, No. 06 Civ. 1230 (DGT) (RML), 20099 U.S. Dist. LEXIS 110229, at *5-6 (E.D.N.Y. Sept. 16, 2009) (report and recommendation) (citation omitted), *adopted by* 2009 U.S. Dist. LEXIS 110232 (Nov. 24, 2009). Before determining to impose a severe sanction, such as dismissal or default, the court should also consider the non-compliant party's willfulness or its reason for noncompliance, as well as the efficacy of lesser sanctions. *See Agiwal*, 555 F.3d at 302; *S.E.C. v. Euro Sec. Fund*, 98 Civ. 7347 (DLC), 2009 U.S. Dist. LEXIS 76590, at *12 (S.D.N.Y. Aug. 27, 2009) (citing *Agiwal*).

II. PLAINTIFF'S MOTION

A. The Requested Monetary Sanction

The determination of whether to grant monetary sanctions for a failure to comply with this Court's scheduling and discovery orders falls within the scope of this Court's reference for general pretrial supervision, and, based on the above history, this Court finds that a monetary sanction is warranted under Rule 37(b)(2)(c). In particular, such a sanction is warranted in order to compensate Plaintiff, his counsel, and his interpreter for the time they spent attending the scheduled December 1, 2016 conference, at which Defendants and their counsel failed to appear. Prior to that conference, this Court explicitly warned both Defendants and their counsel that their failure to appear could result in precisely such sanctions. (*See* Dkt. 33 ¶ 2.) As this Court did not issue the same explicit warning prior to the scheduled November 15, 2016 conference, this Court, in its discretion, is limiting the sanctions award to the costs reasonably incurred for the second conference alone.

In addition, this Court notes that the attorneys' fees being sought by Plaintiff, in connection with the December 1, 2016 conference, should be reduced, as the presented fees appear higher than are reasonable for this market, for work on FLSA cases. At the time of his relevant work on this case, Plaintiff's counsel, Barton, who is seeking to recover fees for his time at the rate of $375 per hour, was a fourth-year associate at the Faillace Firm. (*See* Barton Decl. ¶ 9 (stating that Barton had graduated from law school in 2012 and had begun practicing with the Faillace Firm in January 2015).) In the context of fee applications made in this Court by the Faillace Firm in other FLSA and NYLL cases, this Court has recently found the hourly rates charged by associates with the firm to be higher than the "prevailing [rates] in the community for similar services by lawyers of reasonably comparable . . . experience." *Almanzar v. 1342 St. Nicholas Ave. Rest. Corp.*, No. 14cv7850 (VEC) (DF), 2016 U.S. Dist. LEXIS 155116, at *54-55 (S.D.N.Y. Nov. 7, 2016) (internal quotation marks and citations omitted). Indeed, this Court has recently recommended that, for purposes of a fee award, the rates charged by considerably more senior associates than Barton, with the Faillace Firm, be reduced to $300 per hour, *see id.* (collecting cases), and that the rates of certain more junior associates at the firm be reduced to $225 per hour, *see Rodriguez v. Obam Mgmt.*, No. 13cv00463 (PGG) (DF), 2016 U.S. Dist. LEXIS 155315, at *80 (S.D.N.Y. Nov. 7, 2016) (report and recommendation). In view of this

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range, this Court will reduce Barton's requested rate to $250 per hour, for purposes of the sanctions award.[3]

This Court does not take similar issue with the rate of $100 per hour charged by the interpreter, Humberto Alvarez ("Alvarez"), who accompanied Barton and Plaintiff to the conference. (*See* Barton Decl. ¶ 10.) According to Barton, Alvarez worked as a paralegal at the Faillace Firm (*id.*), and $100 per hour is a reasonable paralegal rate, *see, e.g.*, *Guo v. Tommy's Sushi, Inc.*, No. 14cv3964 (PAE), 2016 WL 452319, at *5 (S.D.N.Y. Feb. 5, 2016) (reducing the requested rate of a "paralegal, interpreter, and law clerk" from $150 per hour to $100 per hour in an FSLA and NYLL case).

Finally, this Court notes that Barton and Alvarez are each seeking to recover for 1.5 hours of their time, for attending the December 1 conference. The conference, however, took no more than half that time. It is true that Barton and Alvarez were present in the courtroom at the time when the conference was scheduled to begin – and that they waited for at least half an hour before this Court made the determination that Defendants and their counsel were not appearing and took the bench to make a record of this – but the actual conference then lasted no more than about 10 minutes. Estimating that Barton and the interpreter were present in court for a total of perhaps 45 minutes, this Court assumes that the additional 45 minutes that each recorded in their time entries must have been for travel time. Typically, in this District, attorney travel time is only compensated at 50 percent of the attorney's reasonable billing rate. *See Siegel*

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[3] While it is this Court's current view that $250/hour is a reasonable rate for Barton's work on this case, this Court makes this finding, at this time, solely for purposes of the sanctions motion; this aspect of this Court's sanctions ruling is not intended to bind the parties or the Court on the issue of the appropriate hourly rate to apply for Barton on any fee application that Plaintiff may make as a prevailing party in this litigation, or in connection with a proposed default judgment.

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v. Bloomberg L.P., No. 13cv1351 (DF), 2016 WL 1211849, at *7 (S.D.N.Y. Mar. 22, 2016) (collecting cases and noting that applying a 50 percent reduction to hourly rates for travel time is the "customary practice in this District").

Accordingly, this Court calculates Plaintiff's reasonable attorneys' and paralegal/interpreter fees for the December 1, 2016 conference as follows:

Barton	$250/hour	x	.75 hours (conference)	=	$187.50
	$125/hour	x	.75 hours (travel)	=	$ 93.75
Alvarez	$100/hour	x	.75 hours (conference)	=	$ 75.00
	$50/hour	x	.75 hours (travel)	=	$ 37.50
			Total fees		$393.75

In this Court's wide discretion to impose reasonable sanctions, and given that this total figure has necessarily been estimated to account for the division between in-court and travel time, this Court will round the total to $400, finding this to be a fair estimate of the fees expended by the Faillace Firm in appearing for the December 1, 2016 conference. In addition, this Court notes that, in his Declaration, Barton represents that Plaintiff, himself, "had to miss two days of work to attend [the November 15 and December 1] conferences, and thus suffered lost earnings of $400." (Barton Decl. ¶ 6.) On the assumption that Plaintiff suffered lost earnings of $200 per day for each of the two conference days, this Court finds it reasonable to charge Defendants and their counsel with Plaintiff's losses for the second of the two conferences, in addition to the attorneys' fees set out above, for a total sanctions award of $600.

This Court imposes 50 percent of this sanction (*i.e.*, $300) on Defendants Amparo and Tito Transmission, and 50 percent (*i.e.*, $300) on their counsel, Pagan, payable by both Defendants and Pagan no later than February 22, 2017.

B. The Requested Default Judgment

After Defendants failed to produce certain documents in accordance with a directive of this Court, this Court afforded Defendants a second opportunity to make that production, but, given their confusing representations regarding the nature of Plaintiff's employment, this Court also ordered both Defendants' counsel, and Defendants themselves, to appear for an in-person court conference. When neither Defendants nor their counsel, Pagan, then appeared for that conference, this Court rescheduled the conference, providing Defendants with clear written notice of the potential consequences of a second failure to appear, including that such a failure could result in the entry of a default judgment against them. (Dkt. 33 ¶ 2.) This Court also made clear that Defendants could be sanctioned under Rule 37(b) for a continued failure to comply with the Court's discovery orders. (*Id.* ¶ 3.) When Defendants and Pagan then *again* failed to appear, Plaintiff filed his motion for a default judgment, pointing out not only Defendants' non-appearance, but also that Defendants had still not produced the documents that they had been ordered to produce. In light of Defendants' failures both to appear in court and to comply with this Court's discovery orders, this Court then issued an Order directing Defendants to show cause why they should not be sanctioned, including with the potential sanction of default. Defendants failed to respond to that Order, as well, despite having been given ample time to do so.

Arguably, this is a sufficient history of second chances and fair warnings to provide grounds for the entry of a default judgment against Defendants. *See, e.g.*, *Fajardo v. Arise News, Inc.*, No. 15cv6912 (PKC), 2016 WL 2851339, at *2 (S.D.N.Y. May 13, 2016) (default warranted where defendants failed to appear for both scheduled and re-scheduled court conferences); *Silverman & Silverman, LLP v. Pacifica Foundation*, No. 11cv1894 (FB) (RML),

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2014 WL 3724801, at *1, *4 (E.D.N.Y. July 25, 2014) (adopting recommendation that default judgment be entered where defendant failed to comply with discovery obligations and "repeatedly failed to follow, or even respond to," the court's orders); *Joe Hand Promotions, Inc. v. Blais*, No. 11cv1214 (FB) (MDG), 2012 WL 6641660, at *1-2 (E.D.N.Y. Sept. 20, 2012) (report and recommendation) (recommending default where defendants failed to appear for court conference or to respond to court's order that they submit an explanation for their failure to appear), *adopted by* 2012 WL 6633931 (Dec. 20, 2012).

Nonetheless, this Court cannot yet conclude that a less severe sanction would be ineffective in securing Defendants' appearance in court and their cooperation in the discovery process, and, as set out above, lesser sanctions should be considered before the Court takes the extreme step of imposing a default judgment against a non-compliant party. *See Agiwal*, 555 F.3d at 303. Accordingly, at this time, this Court will defer recommending to Judge McMahon that she enter a default judgment against Defendants. Rather, this Court will impose the monetary sanction set out above, and will give Defendants and Pagan *one final warning* regarding the need to comply with this Court's Orders. If, despite this final warning, they still disregard this Court's directives, then this Court will proceed to recommend that Defendants be held in default.

CONCLUSION

For all of foregoing reasons, it is hereby ORDERED as follows:

1. No later than February 22, 2017, Defendants Tito Transmission and Amparo, together with Defendants' counsel, Pagan, shall pay to Plaintiff a monetary sanction of $600, with Defendants being responsible, jointly and severally, for the payment of $300, and Pagan being personally responsible for the payment of the remaining $300.

2. No later than February 22, 2017, Defendants shall produce to Plaintiff all records in Defendants' possession, custody or control, evidencing (a) Defendants' employment of Plaintiff, including the amount of wages paid to Plaintiff, the hours he worked, and any wage statements or wage notices he received, and/or (b) any payments made by Defendants to a "Mr. Garcia" or to any other person or entity, for work performed by Plaintiff.

3. This Court will reschedule the in-person conference one final time, to March 1, 2017, at 11:30 a.m. Pagan is directed to confirm to the Court, in writing, no later than February 22, 2017, that both he and his clients will be in attendance on March 1. If the Court does not receive such confirmation by the close of business on February 22, then it will cancel the conference, rather than require Plaintiff's counsel and Plaintiff to appear unnecessarily, for a third time.

4. Plaintiff is directed to report to the Court by February 23, 2017, whether Defendants have paid their portion of the sanction award and produced the documents described in paragraph 2, above. If Defendants have not complied with these aspects of this Court's Order, or provided a legitimate justification for their failure to do so, then this Court will conclude that no lesser sanction than a default judgment would be appropriate here, and it will cancel the March 1 conference and recommend to Judge McMahon that a default judgment be entered against Defendants.

5. Similarly, if Pagan does not confirm to the Court by February 22 that both he and his clients will attend the March 1, 2017 conference – or if the conference remains on the

calendar, but Defendants then fail to appear – then this Court will proceed to recommend the entry of a default judgment against Defendants, with no need for any further submission by Plaintiff.

Dated: New York, New York
February 8, 2017

SO ORDERED

DEBRA FREEMAN
United States Magistrate Judge

Copies to:

All counsel (via ECF)